No. 89-689

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES CHARLES DUGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
GARY R. ALLEN
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether this Court's decisions in *United States* v. *Baggot*, 463 U.S. 476 (1983), and *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), should be applied to prohibit the use of grand jury materials authorized by the district court's 1981 order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-5a) is reported at 877 F.2d 632. The memorandum and order of the district court (Pet. App. 6a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on June 22, 1989. The petition for a writ of certiorari was filed on September 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was indicted following a 1980 federal grand jury investigation into a drug network in the Southern

District of Illinois. He subsequently pleaded guilty to one count of the indictment and to one count of an information charging him with income tax evasion. In March 1981, the United States District Court for the Southern District of Illinois, pursuant to an *ex parte* government motion, entered an order under Fed. R. Crim. P. 6(e) authorizing disclosures of matters occurring before that grand jury to the Internal Revenue Service (IRS) for use in determining petitioner's correct tax liability for the years 1978 and 1979. The documents disclosed to the IRS under the terms of that order formed the basis of statutory notices of deficiency in income tax for 1978 and 1979 that were issued to petitioner by the IRS. In June 1983, petitioner filed a petition with the United States Tax Court challenging those deficiencies. Pet. App. 6a-7a.

On June 30, 1983, this Court held that Rule 6(e) requires the government to make a showing of "particularized need" in order to obtain disclosure of matters occurring before a grand jury (*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418) and that Rule 6(e) does not allow disclosure of matters occurring before a grand jury for use in an investigation to determine civil tax liability (*United States* v. *Baggot*, 463 U.S. 476). Petitioner then filed a motion in the Tax Court to suppress the grand jury material, to shift the burden of proof, and to deny the presumptive correctness of the notices of deficiency, on the ground that *Baggot* and *Sells* should be applied to invalidate the Rule 6(e) order under which the IRS had obtained the grand jury materials. The Tax Court denied that motion. *Dugan* v. *Commissioner*, 49 T.C.M. (CCH) 586 (1985).

Petitioner then instituted an action in the district court, arguing that the Rule 6(e) order should be revoked because the government's initial application failed to meet the standards later enunciated in *Baggot* and *Sells*. The district court denied relief, and the court of appeals affirmed. *In re Grand*

Jury Proceedings "Operation Gateway", 839 F.2d 390 (7th Cir. 1988) (*Dugan I*). Citing its prior opinion in *In re Disclosure of Grand Jury Material. Basic Earth Science Systems, Inc.*, 821 F.2d 1290 (7th Cir. 1987), the court held that "retroactivity analysis is not applicable to Rule 6(e) orders which became final prior to June 30, 1983, when the Supreme Court decided *Baggot* and *Sells*" (839 F.2d at 392). Accordingly, the court of appeals concluded that the Rule 6(e) order remained valid, and it affirmed the district court's refusal to apply *Baggot* and *Sells* to modify that order, though it held open the possibility that petitioner could seek other relief from the district court.[1]

2. Petitioner did not seek further relief in the district court. Instead, he returned to the Tax Court and renewed his argument that *Baggot* and *Sells* should apply retroactively to govern the continuing validity of the 1981 order. The Tax Court agreed and entered an order preventing counsel for the IRS from using or disclosing the grand jury material in that court without a new Rule 6(e) order based on a showing of "particularized need." See Pet. App. 2a.

The government then filed an *ex parte* application with the district court for such a new Rule 6(e) order. The court amended its earlier order, finding that the IRS had a particularized need for the documents and explicitly stating that the materials could be used in the Tax Court litigation. Petitioner filed a motion to vacate the amended order, which the district court denied (Pet. App. 6a-12a). The court stated that the government had satisfied the "particularized need" standard of *Sells* (*id.* at 10a). The court noted that the

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[1] The court of appeals stated that its ruling did not preclude petitioner "from asking the district court to rule on whether the IRS is exceeding the scope of the order by seeking to use the materials in the Tax Court proceedings" or from "try[ing] to convince the district court that exceptional circumstances require that the order be modified or vacated" (839 F.2d at 392).

material had been available to the Commissioner since 1981 and that most of the government's evidence in the Tax Court litigation was grand jury material, and it concluded that "barring the government from the ability to continue to use this material would significantly * * * affect the agency's ability to recoup taxes" (*id.* at 11a).

3. The court of appeals affirmed (Pet. App. 1a-5a). It held that the Tax Court's order forbidding the IRS from continuing to use the grand jury materials under a valid Rule 6(e) order could not be reconciled with the court of appeals' decision in *Dugan I* rejecting the retroactive application of *Baggot* and *Sells* to the order in this case. The court thus stated that petitioner "had no business seeking, and the Tax Court no authority to issue," an order contrary to the court of appeals' holding in *Dugan I*. Pet. App. 3a. Accordingly, the court of appeals concluded that the district court's order should not be reversed, even though it regarded the district court's finding of "particularized need" on these facts to be erroneous, because the court of appeals had already "held in 1988 that the IRS does not have to show 'particularized need' to use the materials in ways approved in 1981" (*id.* at 4a). Noting that the district court's amended order clarified that in 1981 the court had contemplated the use of the grand jury materials in litigation, the court of appeals concluded that "the IRS is entitled to use the grand jury materials in its possession to conduct the pending litigation in the Tax Court" (*id.* at 4a-5a).

ARGUMENT

Petitioner contends that this Court should grant certiorari to consider the effect of its decisions in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), and *United States* v. *Baggot*, 463 U.S. 476 (1983), on pre-existing Rule 6(e) orders. That issue is not properly presented in this case, and,

in any event, is of diminishing future importance. Moreover, the decision of the court below is correct, and there is no conflict in the circuits on the question presented by petitioner. Accordingly, there is no reason for review by this Court.

1. In *Dugan I*, the court of appeals held that the validity of the district court's 1981 Rule 6(e) order in this case was unaffected by the later decisions in *Baggot* and *Sells*. Petitioner did not seek certiorari from that decision, and therefore, as the court below stated, it is "preclusive between the parties" (Pet. App. 5a). The instant case arises out of a second proceeding in the district court, precipitated by petitioner's request for a protective order in the Tax Court and the government's subsequent request for an amended Rule 6(e) order in the district court. In affirming the district court, the court of appeals did not hold *in this case* that *Baggot* and *Sells* do not apply retroactively to invalidate the 1981 order. Rather, it relied on its previous "preclusive" holding "that the IRS does not have to show 'particularized need' to use the materials in ways approved in 1981" (Pet. App. 4a); it then proceeded to hold that use in the Tax Court litigation had been contemplated in 1981, and therefore it affirmed the district court's judgment. Thus, the question of retroactive application of *Baggot* and *Sells* is presented here only if the court below erred in holding that its 1988 decision on that issue is binding on the parties. Petitioner does not, and cannot, challenge the correctness of that conclusion, and therefore the question presented in the petition is not properly before the Court.

2. Even if the question of retroactive application of *Baggot* and *Sells* were presented here, there would be no reason for this Court to grant certiorari. The Court declined to grant certiorari to review that issue in *Raven's Hollow, Ltd.* v. *United States*, 481 U.S. 1032 (1987), and there is no more reason to review this case. Indeed, the significance of the

issue presented by petitioners, which applies only to Rule 6(e) orders entered before June 30, 1983, is continually diminishing with the passage of time.

a. There is no merit to petitioner's contention that *Baggot* and *Sells* should be applied to prevent the use after June 30, 1983, of grand jury material obtained under pre-existing Rule 6(e) orders. *Baggot* and *Sells* announced standards that a court must follow in authorizing, in the first instance, disclosure of grand jury materials under Rule 6(e); those cases did not purport to prohibit future use of grand jury materials obtained under the authority of Rule 6(e) orders that had previously been entered under a lesser standard. It is well established that a final judgment in a civil case cannot be retrospectively challenged on the basis of a subsequent decision. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940). There is similarly no reason to vacate a Rule 6(e) order that was properly issued under then-prevailing standards and subsequently relied on in determining the tax deficiencies under dispute in the Tax Court proceeding, when there has been no showing (and none was made here) that a failure to vacate the order would be inequitable. See, *e.g.*, *Systems Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961); *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932).[2] Thus, petitioner's con-

[2] Contrary to petitioner's suggestion (Pet. 18-19), *Wright* and *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984), do not stand for the proposition that valid court orders must be vacated or modified to account for a change in the law that would have precluded the issuance of the order as an original matter. To the contrary, the Court carefully noted in *Wright* that "[a] balance must * * * be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances" (364 U.S. at 647-648) and that "there must be wide discretion in the District Court" (*id.* at 648). Modification is required only "when a change in law or facts has made inequitable what was once equitable" (*id.* at 652). Peti-

tention has consistently been rejected by the courts of appeals. See *In re Disclosure of Grand Jury Material. Basic Earth Science Systems, Inc.*, 821 F.2d 1290 (7th Cir. 1987); *United States* v. *(Under Seal)*, 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987); *Gluck* v. *United States*, 771 F.2d 750 (3d Cir. 1985) (grand jury materials obtained under a facially valid pre-*Baggot* and *Sells* Rule 6(e) order are not suppressible even assuming that *Baggot* and *Sells* should be applied retroactively).

Vacating the Rule 6(e) order entered in this case would not operate to vindicate the public policies underlying *Baggot* and *Sells* and is not necessary to remedy any unfairness to petitioner. The materials in question were obtained by the IRS pursuant to a disclosure order that petitioner concedes was valid when entered and that petitioner assumes (Pet. 16-17) cannot be invalidated *ab initio* by *Sells* or *Baggot*. There is thus no suggestion of improper government conduct that needs to be remedied. See *Gluck* v. *United States*, 771 F.2d 750, 757-758 (3d Cir. 1985) (upholding IRS summons issued in good-faith reliance on a pre-*Baggot* Rule 6(e) disclosure order). To the contrary, the effect of vacating the order here would be to delay and complicate tax proceedings prepared in good faith over an eight-year period—in an effort to detract from the accuracy of those proceedings. Moreover, prohibiting the future use of materials disclosed under pre-1983 Rule 6(e) orders is obviously not necessary to protect the public policies underlying the decision in *Sells*—enhancing the willingness of grand jury witnesses to come forward and testify fully and candidly, and preventing the improper use of the grand jury for civil

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tioner does not explain why it would be inequitable to allow the IRS to continue to use the grand jury material in accordance with the 1981 order; to the contrary, as we explain (p. 8, *infra*), it would be inequitable to prohibit such use.

discovery purposes. See 463 U.S. at 432-433. Those interests are safeguarded by applying the standards adopted in *Baggot* and *Sells* to future disclosure applications.[3]

On the other hand, petitioner's proposed application of *Baggot* and *Sells* could significantly prejudice the government's opportunity to complete the ongoing civil and administrative proceedings. The government reasonably relied on the disclosed materials in preparing for and developing those proceedings. Vacating the Rule 6(e) order would, at a minimum, force the government to engage in the burdensome process of attempting to reacquire these materials through civil discovery. At worst, the government could be denied the opportunity to obtain these materials at all, on the ground that the IRS's efforts to reacquire these materials are "tainted" by the knowledge it obtained from its current use of them. Petitioner has offered no reason why he should be allowed to obtain a litigating advantage in this fashion—to the detriment of a just resolution of the merits of the tax controversy. In sum, in these circumstances it would be a decision to revoke the pre-1983 Rule 6(e) order, not the continued effectiveness of that order, that would serve as "an instrument of wrong" (*Systems Federation No. 91* v. *Wright*, 364 U.S. at 647).

b. There is no merit to petitioner's contention (Pet. 11-15) that there exists a conflict on the retroactivity question between the Seventh Circuit and other courts of appeals. *In re Sells*, 719 F.2d 985 (9th Cir. 1983), in contrast

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[3] Petitioner suggests (Pet. 17) that the continued access to the grand jury material under the 1981 order is the equivalent of a new "disclosure" under the Rule, which under *Sells* can be made only upon a showing of "particularized need." In *United States* v. *John Doe, Inc.*, 481 U.S. 102 (1987), however, this Court clearly rejected the claim that "use" of grand jury materials under an existing Rule 6(e) order is the equivalent of a "disclosure" of that material under the Rule.

to this case, involved a direct appeal from a Rule 6(e) order entered before this Court's decision in *Baggot*. Following the general rule that an appellate court should apply existing law (see, *e.g.*, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-283 (1969)), the court of appeals held that the Rule 6(e) order should be reversed on the authority of *Baggot*. But the Ninth Circuit's decision in *Sells*, like this Court's decisions in *Thorpe* and in *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), has no bearing on petitioner's contention here. When a case is pending on direct appeal at the time the controlling law changes, *Schooner Peggy* holds that the appellate court applies the law as it exists, *i.e.*, in light of the recent change. That principle, however, does not apply to orders that have already become final, and thus are before the court only by virtue of an attempt to modify or vacate such orders because of the change in the law. See *Chicot County Drainage District* v. *Baxter State Bank*, *supra*; *In re Disclosure of Grand Jury Material. Basic Earth Science Systems, Inc.*, 821 F.2d at 1293. Thus, there is no inconsistency between the Ninth Circuit's decision in *Sells* and the Seventh Circuit's decision in *Basic Earth Science*.

Similarly, there is no conflict between the Seventh Circuit and the Second Circuit's decision in *In re Grand Jury Proceedings (Henry Kluger, Deceased)*, 827 F.2d 858 (1987). In *Kluger*, the district court had modified a pre-*Baggot* Rule 6(e) order to condition further disclosures on a showing of particularized need. The court of appeals emphasized that this modification was an exercise of the district court's discretion and therefore the scope of appellate review was "narrow" (827 F.2d at 874). The court of appeals upheld the modification, explaining that it was "unable to conclude that" the district judge had "transgressed the limits of his discretion" (*ibid.*). Clearly, that decision does not stand for the proposition that every pre-1983 Rule 6(e) order must

be vacated unless the government makes a showing of particularized need, and therefore it does not conflict with the Seventh Circuit's rejection of petitioner's contentions. Hence, there is no conflict in the circuits on the question petitioner seeks to present, which, as we have explained, is not in any event properly before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
GARY R. ALLEN
CHARLES E. BROOKHART
WILLIAM A. WHITLEDGE
Attorneys

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